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No. 88-1951 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

FRANCES L. DALM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the doctrine of equitable recoupment provides a basis for jurisdiction over a taxpayer's suit against the United States for a refund of an erroneous tax payment, when that suit is otherwise barred as untimely by Sections 7422 and 6511 of the Internal Revenue Code.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 867 F.2d 305. The opinion of the district court (Pet. App. 17a-20a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a-22a) was entered on February 8, 1989. On May 2, 1989, Justice Scalia extended the time to petition for a writ of certiorari to and including June 8, 1989. The petition was filed on June 5, 1989, and was granted on October 2, 1989. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Sections 6511 and 7422 of the Internal Revenue Code (26 U.S.C.) are set forth in a statutory appendix (App., *infra*, 1a).

STATEMENT

1. Respondent, who had been a long-time employee of Harold Schrier, was appointed administratrix of his estate in May 1975 at the request of Clarence Schrier, the decedent's brother and the sole beneficiary of the estate. The estate paid respondent fees of $30,000 in 1976 and $7,000 in 1977, which were approved by the probate court. Respondent also received from Clarence Schrier a payment of $180,000 in 1976 and a payment of $133,813 in 1977. In December 1976, Clarence Schrier and his wife filed a gift tax return reporting the $180,000 transfer in that year as a gift to respondent, and respondent paid the reported gift tax of $18,675. The Schriers subsequently were assessed $1,587 in interest and penalties with respect to the 1976 transfer, which they paid in March 1977 and for which respondent reimbursed them. No gift tax return was filed respecting the 1977 transfer. Pet. App. 2a, 17a; C.A. App. 79.

On audit, the Internal Revenue Service (IRS) determined that the payments made by Clarence Schrier to respondent represented additional fees for her services as administratrix of the estate, which should have been reported as income.[1] The IRS accordingly asserted deficiencies in respondent's income tax of

[1] This determination was based upon an agreement regarding the distribution of the estate that was executed in 1975 by respondent and Clarence Schrier. See C.A. App. 58.

$91,471 for 1976 and $70,639 for 1977, together with additions to tax under I.R.C. § 6653(a) of $4,574 and $3,532 for those years, respectively. Respondent petitioned the Tax Court for a redetermination of the asserted deficiencies, contending that the transfers of $180,000 and $133,813 were gifts from Clarence Schrier intended to carry out his brother's intention that respondent share in the estate. After two days of trial, the parties negotiated a settlement of the Tax Court case for one half the total amount of the asserted deficiencies (excluding penalties), and they agreed to a stipulated decision that respondent owed income tax deficiencies of $10,416 for 1976 and $70,639 for 1977. Pet. App. 2a-3a, 17a-18a.

2. In November 1984, promptly after agreeing to settlement of her Tax Court case, respondent filed an administrative claim for refund of the $20,262 in gift tax, interest, and penalties paid with respect to the $180,000 transferred to her in 1976. Pet. App. 3a. This claim was untimely, however, since it was filed almost five years after the expiration of the three-year limitations period provided in Section 6511 of the Internal Revenue Code[2] for the recovery of overpayments of gift, estate, or income tax. When the IRS failed to act on the refund claim within six months, respondent brought this suit for refund of "overpaid gift taxes" (C.A. App. 5) in the United States District Court for the Western District of Michigan.

The district court granted the government's motion to dismiss for lack of jurisdiction (Pet. App. 17a-20a). After noting that the suit unquestionably was untimely under the applicable statute of limitations,

[2] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

the court rejected respondent's contention that the suit could be maintained under the doctrine of equitable recoupment set forth in *Bull* v. *United States*, 295 U.S. 247 (1935). Citing this Court's decision in *Rothensies* v. *Electric Storage Battery Co.*, 329 U.S. 296 (1946), and the Seventh Circuit's decision in *O'Brien* v. *United States*, 766 F.2d 1038 (1985), the district court concluded that there was no authority for using equitable recoupment as the jurisdictional basis for "an independent lawsuit, such as this suit, * * * maintained for a refund for a year in which the statute of limitations has expired" (Pet. App. 19a).[3]

3. The court of appeals reversed (Pet. App. 1a-16a). The court held that the doctrine of equitable recoupment allowed respondent to bring the untimely suit because the payment of the gift tax was inconsistent with the treatment of the transfers in the Tax Court settlement as fees for services rendered. The court of appeals characterized this Court's decision in *Rothensies* v. *Electric Storage Battery Co.*, *supra*, from which the district court had quoted, as narrowing the application of the equitable recoupment doctrine established in *Bull* v. *United States*, *supra* (see Pet. App. 6a), but stated that "[t]he facts in *Rothensies* were quite different from those in *Bull* and the present case" (*id.* at 8a).

Citing the Ninth Circuit's decision in *Kolom* v. *United States*, 791 F.2d 762 (1986), the court enu-

[3] The district court also observed that the Tax Court settlement appeared designed to reflect the prior payment of gift tax, and therefore that respondent in any event would not be entitled to a refund of that tax (Pet. App. 20a). The court also stated that, pursuant to Section 6512(a) of the Code, commencement of the Tax Court proceeding for 1976 barred this suit for refund of 1976 taxes (*ibid.*).

merated three prerequisites to the application of equitable recoupment (Pet. App. 9a-10a): "There must be (1) a single transaction or taxable event, (2) that event must be subjected to two taxes based on inconsistent legal theories, and (3) the amount claimed in recoupment must be barred by limitations while the government's deficiency claim must be timely." The court then held that these three requirements were satisfied in this case. With respect to the third criterion, the court stated that, "[a]lthough the taxpayer was the plaintiff in the refund action, her reliance on equitable recoupment was "in the nature of a defense'" (*id.* at 10a). The court concluded (*id.* at 10a-11a): "[Respondent's] refund action was not barred by the statute of limitations though filed more than three years after the gift taxes were paid. Her claim for recoupment related to the government's timely deficiency action and was timely as well for purposes of recoupment." In so holding, the court summarized the holding of this Court in *Bull* v. *United States*, *supra*, as follows (Pet. App. 14a): "[W]hen a single transaction is taxed twice under inconsistent legal theories and the government has collected the second tax in a timely action, the earlier tax can be offset against the later one in an action for refund ."[4]

SUMMARY OF ARGUMENT

A. It is fundamental that the United States, as sovereign, is immune from suit, and therefore may be

[4] The court of appeals also held that the district court could not grant summary judgment for the government on the alternative ground that the Tax Court settlement for 1976 took the gift tax overpayment into account (Pet. App. 14a-16a). The court of appeals remanded for fact finding on the intent of the parties to the Tax Court settlement (*id.* at 16a).

sued only upon satisfaction of the conditions under which Congress has consented to suit. A statute of limitations is "a condition on the waiver of sovereign immunity," and, as such, "define[s] the extent of the court's jurisdiction" over an action governed by that limitations period. *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986). Because respondent concededly did not file a timely claim for refund of gift taxes, it is undisputed that this suit is untimely under the general provisions governing the conditions under which tax refund suits may be brought against the United States. See I.R.C. §§ 6511(a), 7422. And it is similarly undisputed that the mitigation provisions (I.R.C. §§ 1311-1314), in which Congress excepted from the general limitations provisions certain suits involving claims of inconsistent treatment, do not apply in these circumstances. Thus, as the court of appeals acknowledged (Pet. App. 5a), there is no statutory basis for district court jurisdiction over this lawsuit.

B. The doctrine of equitable recoupment approved by this Court in *Bull* v. *United States*, 295 U.S. 247 (1935), has no application here. As its name implies, this judicial doctrine involves the recoupment of a tax overpayment by means of an adjustment to another tax liability. Specifically, it permits a refund claim that would be time-barred if brought independently to be applied to reduce another related tax liability that is being litigated in a timely-filed proceeding. Thus, the doctrine does not operate to confer upon a court jurisdiction over a lawsuit that is barred by the statute of limitations; rather, it is only because the court properly has jurisdiction over the timely claim that it is empowered, in an appropriate case, to offset or credit a prior overpayment of tax whose direct refund is barred by the statute of limitations. This constraint on equitable recoupment has been repeatedly expressed by this Court, which has explicitly stated that equitable recoupment "cannot avail to toll the statute of limitations" (*id.* at 259), but rather can be raised only "in the nature of a defense * * * so long as the main action itself is timely" (*id.* at 262). See also *Stone* v. *White*, 301 U.S. 532, 539 (1937).

Thus, the court of appeals' holding that equitable recoupment can give a court jurisdiction over an independent refund suit against the United States that is barred by the statute of limitations is flawed in several respects. It contradicts the restrictions on the equitable recoupment doctrine that have been emphasized by this Court. It violates fundamental principles of sovereign immunity by permitting a suit against the United States without satisfying the prerequisites established by Congress to such a suit. It also does not comport with the detailed mitigation provisions established by Congress that specifically permit time-barred refund suits in certain specified circumstances of inconsistent tax treatment. If the court of appeals' view of equitable recoupment were correct, it would have been unnecessary for Congress to enact the mitigation remedy. The all-encompassing availability of recoupment would also effectively thwart Congress's considered decision to restrict, to the circumstances carefully defined in the mitigation provisions, the right to bring a refund suit that does not comply with the generally applicable statute of limitations.

The effect of the decision below is to nullify the statute of limitations for all cases in which a taxpayer can argue that he has been subjected to inconsistent tax treatment. But such a taxpayer has no stronger claim to refund than any other taxpayer who has overpaid his taxes, but whose refund claim

is barred by the statute of limitations. Respondent failed to take the proper steps to claim a gift tax refund in a timely fashion, and, like any other taxpayer, she has no right to have the district court exercise jurisdiction over a suit barred by the applicable statute of limitations. As this Court held in rejecting another proposed extension of the applicability of equitable recoupment (*Rothensies* v. *Electric Storage Battery Co.*, 329 U.S. 296, 303 (1946)), "[i]f there are to be exceptions to the statute of limitations, it is for Congress rather than for the courts to create and limit them."

ARGUMENT

THE DOCTRINE OF EQUITABLE RECOUPMENT DOES NOT PROVIDE A BASIS FOR JURISDICTION OVER AN INDEPENDENT SUIT AGAINST THE UNITED STATES FOR A TAX REFUND, WHEN THAT SUIT IS BARRED BY THE STATUTE OF LIMITATIONS

A. Respondent's Refund Suit Did Not Satisfy The Conditions Under Which Congress Conferred Jurisdiction Upon The Courts To Entertain Such Suits Against The United States

It is a fundamental principle of federal jurisprudence that "the United States, as sovereign, 'is immune from suit, save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.' " *United States* v. *Testan*, 424 U.S. 392, 399 (1976), quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); see also *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980). It is equally clear that, when Congress establishes a statute of limitations for suits against the United States, "the limitations provision constitutes a condition on the waiver of sovereign immunity," and, as such, "define[s] the extent of the court's jurisdiction" over such an action. *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986); see also *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983). It is the responsibility of Congress to decide when to waive the sovereign immunity of the United States, and hence " 'this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.' " *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981), quoting *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). This principle applies fully to statutes of limitations, even though they may operate to deny a litigant the right to present an otherwise valid claim for recovery from the United States. As this Court has noted, the "very purpose" of a statute of limitations is to "make it impossible to enforce what were otherwise perfectly valid claims" (*United States* v. *Kubrick*, 444 U.S. 111, 125 (1979)). Limitations periods nonetheless "must be strictly adhered to by the judiciary" (*Kavanagh* v. *Noble*, 332 U.S. 535, 539 (1947)). In sum, any limitations period that Congress has imposed as a precondition to suit against the United States must be strictly observed, and failure to comply with that condition bars the court from entertaining a lawsuit.

In this case, a taxpayer is seeking to recover from the government an alleged overpayment of gift tax. The suit was brought under 28 U.S.C. 1346(a)(1) (see C.A. App. 4), which confers jurisdiction on the district courts over a "civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." That waiver of sovereign immunity, however, is expressly limited by the detailed provisions of Section 7422 of the Code. In particular, Sec-

tion 7422(a) conditions the right to bring such a refund suit upon the taxpayer's first having "duly filed with the Secretary" a claim for refund "according to the provisions of law in that regard." In the case of a tax for which a return is required (which includes the gift tax), Section 6511(a) of the Code requires that this claim for refund be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever period expires later. A refund claim filed outside the time limits imposed by Section 6511(a) has not been "duly filed" within the meaning of Section 7422(a), and therefore cannot satisfy the predicate for commencing a suit for refund. See, *e.g.*, *United States* v. *Kales*, 314 U.S. 186, 193 (1941); *Crismon* v. *United States*, 550 F.2d 1205, 1206 (9th Cir. 1977), cert. denied, 434 U.S. 807 (1977); *Clement* v. *United States*, 405 F.2d 703, 705 (1st Cir. 1969).

In this case, Clarence and Ethel Schrier filed their gift tax return, and respondent paid the tax reported on the return, in December 1976. The Schriers paid interest and penalties on the gift tax, for which they were reimbursed by respondent, in March 1977. The period prescribed by Section 6511(a) for filing a claim for refund of the gift tax expired, accordingly, in December 1979, three years after the gift tax return was filed. Repondent, however, did not file her refund claim until November 1984, nearly five years after the limitations period had expired. Thus, under the statutory framework erected by Congress to govern refund suits against the United States, respondent's refund action is unquestionably barred by the statute of limitations. Under fundamental principles of jurisdiction and sovereign immunity, the district court was therefore obliged to dismiss the suit. See, *e.g.*, *United States* v. *Mottaz*, 476 U.S. at 843-844;

United States v. *Garbutt Oil Co.*, 302 U.S. 528, 533-535 (1938); *Nichols* v *United States*, 74 U.S. (7 Wall.) 122, 129-131 (1868); *Yuen* v. *United States*, 825 F.2d 244, 245 (9th Cir. 1987).[5]

B. The Doctrine Of Equitable Recoupment Does Not Confer Jurisdiction Upon A Court To Entertain A Time-Barred Suit

The court of appeals and respondent do not take issue with the foregoing discussion. They agree that this suit does not satisfy the limitations period established by Congress for refund suits, and, as the court of appeals observed (Pet. App. 5a), that "[t]here is no statutory basis for permitting the recovery of a tax overpayment after the statute of limitations has expired." The court of appeals held, however, that a nonstatutory basis exists for the district court to assert jurisdiction over this suit—~~especially~~ specially, the judicial doctrine of equitable recoupment.

This holding reflects a fundamental misconception of that doctrine. Equitable recoupment does not operate to permit suits barred by the statute of limitations, or otherwise to change the conditions upon which Congress has waived sovereign immunity. Rather, it merely permits a litigant to raise, in the nature of a defense or offset in a dispute over which the court does have jurisdiction, a claim that could not be the subject of an independent lawsuit by virtue

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[5] Congress, of course, is free to establish specific exceptions to the general limitations governing refund suits that are embodied in Sections 7422 and 6511(a). Indeed, Congress has taken such action in the mitigation provisions (I.R.C. §§ 1311-1314), which permit taxpayers, in certain specified circumstances involving inconsistent tax treatment, to bring actions that would otherwise be barred by the statute of limitations. See pages 25-27, *infra*. It is undisputed, however, that the mitigation provisions do not apply here. See Br. in Opp. 10, 12.

of the statute of limitations. The doctrine of equitable recoupment therefore does not apply to this case and cannot provide the basis for district court jurisdiction over respondent's lawsuit.

1. The applicability of the doctrine of equitable recoupment to tax cases has its source in this Court's decision in *Bull* v. *United States*, 295 U.S. 247 (1935). *Bull* involved a dispute over the taxation of an estate. The decedent had been a member of a partnership at the time of his death. The partnership agreement gave a deceased partner's estate the right to participate in the earnings or losses of the partnership for a year following the partner's death on the same basis upon which the partner would have participated had he remained alive. In preparing the estate tax return, the executor valued the decedent's interest in the partnership for purposes of computing the gross estate on the basis of the decedent's share of the partnership earnings for that year up to the date of death, *i.e.*, without regard to the estate's share of the partnership earnings for one year after the date of death. On audit of the estate tax return, however, the Commissioner determined that the estate's share of post-death partnership earnings was also a component of the value of the partnership interest includible in the gross estate. This increase in the value of the gross estate yielded additional estate tax liability, which was paid by the estate. Subsequently, the Commissioner determined that the post-death partnership earnings were also includible in the estate's gross income for income tax purposes. The executor challenged this determination by petitioning the Board of Tax Appeals, but the Board sustained the income tax deficiency. 295 U.S. at 251-253.

The executor paid the additional income tax and filed a timely claim for refund, which was denied.

Thereafter, he sued in the Court of Claims for a refund of that income tax payment.[6] The court denied the refund claim, concluding that the post-death partnership earnings correctly had been treated as income of the estate. The Court of Claims also rejected the estate's alternative contention that, if the post-death earnings were correctly categorized as income, the government should have credited against the income tax attributable to this income the amount of the estate tax that resulted from including the same earnings in the gross estate. The court reasoned that it could not consider this alternative claim because the time for filing a claim for refund of the estate tax had expired. See 295 U.S. at 253-254; 6 F. Supp. 151 (Ct. Cl. 1934). This Court reversed. The Court held that, even though the time for filing an independent claim for refund of the estate tax had expired, the doctrine of equitable recoupment permitted the executor to credit an overpayment of estate tax against the correctly assessed income tax liability

[6] The executor followed the correct procedure under then-existing law for contesting the income tax deficiency, although this resort to two different forums would not be permitted today. Sections 284(d) and 1001-1003 of the Revenue Act of 1926, ch. 27, 44 Stat. 67, 109-110, made decisions of the Board of Tax Appeals final, subject to appellate review by the courts of appeals and this Court, as are the decisions of the Tax Court today. See I.R.C. §§ 6512, 7482. Prior to 1926, however, the Board, as established by Section 900 of the Revenue Act of 1924, ch. 234, 43 Stat. 336, had authority to determine deficiencies asserted by the Commissioner, but its decisions were not conclusive. At the instance of the unsuccessful party, the controversy could be heard de novo in a district court or the Court of Claims, where the Board's findings were only "prima facie evidence of the facts therein stated" (Section 900(g), 43 Stat. 337). See S. Rep. No. 398, 68th Cong., 1st Sess. 42-43 (1924).

that was directly at issue in the timely income tax refund suit.[7]

Although the Court permitted the estate in *Bull* to reduce its income tax liability by crediting against it an estate tax payment that could no longer be the subject of a refund suit, the Court made clear that the doctrine of equitable recoupment does not override the constraint on a court's jurisdiction imposed by a statute of limitations. Thus, the Court's decision is fully consistent with principles of sovereign immunity in that it does not permit a court to exercise jurisdiction over an action that does not satisfy the prerequisites to suit established by Congress. Rather, equitable recoupment permits a time-barred claim to be raised only as the basis for an offset or credit against a tax that is the subject of a timely-filed action over which the court properly has jurisdiction.

The Court explicitly stated that any inconsistent treatment suffered by the estate in *Bull* did not provide a basis for avoiding the limitations hurdle erected by Congress (295 U.S. at 259): "[t]he fact that the petitioner relied on the Commissioner's assessment for estate tax, and believed the inconsistent

[7] The Court first rejected the government's argument that it was not inconsistent to impose both an estate tax and an income tax on the post-death profits. 295 U.S. at 255-257. The government had argued that the value of these profits had been transferred at death and also received as income by the estate, and hence the profits were properly subjected to both estate and income taxation, just as this Court had acknowledged that the pre-death profits were subject to both income and estate taxation (see *id.* at 255). See Willis, *Some Limits of Equitable Recoupment, Tax Mitigation, and Res Judicata: Reflections Prompted By* Chertkof *v.* United States, 38 Tax. Law. 625, 635 n.77 (1985).

claim of deficiency of income tax was of no force, cannot avail to toll the statute of limitations * * *." The Court noted therefore that, even though "[r]etention of the [estate tax overpayment] was against morality and conscience" (*id.* at 260), once the taxpayer had failed to seek a refund of estate tax within the applicable limitations period, "[i]f nothing further had occurred Congressional action would have been the sole avenue of redress" (*id.* at 261). The estate's ability to recoup the overpayment of estate tax arose only because that claim could be raised as an offset or credit in a timely-filed proceeding to determine the estate's income tax liability arising out of the same transaction.[8] The Court summarized the operation of the doctrine of equitable recoupment as follows (*id.* at 262 (emphasis added)):

> If the claim for income tax deficiency had been the subject of a suit, any counter demand for recoupment of the overpayment of estate tax could have been asserted by way of defense and credit obtained notwithstanding the statute of limitations had barred an independent suit against the Government therefor. This is because recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never

[8] The Court noted that, because of the summary nature of administrative procedures for the collection of tax, the position of a taxpayer who is the plaintiff in a tax refund suit is analytically equivalent to that of a taxpayer who is the defendant in an action brought by the government for the collection of taxes. 295 U.S. at 259-260, 262-263. Hence, the Court held that equitable recoupment may be invoked by the taxpayer in a refund suit, even though he is nominally the plaintiff in such an action and "recoupment is in the nature of a defense" (*id.* at 262).

barred by the statute of limitations *so long as the main action itself is timely.*

In sum, although the facts in *Bull* are similar to those of the instant case in many respects, they differ in one respect that the Court identified as critical. The suit in *Bull* was instituted to recover a tax payment for which a timely refund claim had been filed, and the court therefore properly had jurisdiction over the action; here, respondent's suit was brought to recover a tax payment for which a timely claim for refund had *not* been filed, and the district court therefore lacked any basis for jurisdiction over the action.

In subsequent cases addressing the scope of equitable recoupment, this Court has adhered to the clearly stated principle that the doctrine can be invoked only in the general nature of an offset or defense—to reduce a tax liability that is the subject of a timely action—but not to support a court's jurisdiction to entertain an independent time-barred suit to recover funds from the government. In *Stone* v. *White*, 301 U.S. 532 (1937), the Court held that the government also could invoke the doctrine of equitable recoupment in this manner. In *Stone*, a trust had paid its income to its sole beneficiary, but the trust paid the tax due on the income. After the statute of limitations governing the beneficiary's tax liability had expired, the trustees filed a timely suit to recover the tax paid by the trust on the theory that it was the beneficiary, not the trust, that was actually liable for the tax. The government asserted as a defense to the trust's refund suit that, since any recovery would inure to the benefit of the beneficiary, the tax the beneficiary should have paid should be applied to reduce the tax refund claimed by the trust, which would preclude any recovery.

Finding an identity of interest between the trust and its sole beneficiary (see *id.* at 535-537), this Court held that the government could invoke equitable recoupment in the trust's timely refund suit to assert, in the nature of an offset, its claim against the beneficiary, even though the statute of limitations would have prevented it from asserting a deficiency directly against the beneficiary. The Court explained (*id.* at 538-539): "The statutory bar to the right of action for the collection of the tax does not prevent reliance upon a defense which is not a set-off or a counterclaim, but is an equitable reason, growing out of the circumstances of the erroneous payment why [the trustees] ought not to recover." The Court further observed that the government was not "reviving a stale claim," but was merely raising a "defense, which inheres in the cause of action, [that] is comparable to an equitable recoupment or diminution of [the trustees'] right to recover." *Id.* at 539. Quoting *Bull* (295 U.S. at 262), the Court reiterated that "'[s]uch a defense is never barred by the statute of limitations so long as the main action itself is timely'" (301 U.S. at 539).

Subsequently, in *Rothensies* v. *Electric Storage Battery Co.*, 329 U.S. 296 (1946), the Court rejected an attempt to invoke the doctrine of equitable recoupment, because the allegedly inconsistent tax treatments in that case did not arise out of the same transaction.[9] Stating that equitable recoupment "has

[9] The facts underlying the taxpayer's claim in *Rothensies* were as follows: The taxpayer paid excise taxes on the sale of storage batteries from April 1919 to April 1926 in the belief that the sales were subject to the tax. In July 1926, the taxpayer sought a refund of the excise taxes it had paid between 1922 and 1926, the statute of limitations on obtaining a re-

never been thought to allow one transaction to be offset against another, but only to permit a transaction which is made the subject of suit by a plaintiff to be examined in all its aspects * * *" (*id.* at 299), the Court expressly "declin[ed] to expand the doctrine [of equitable recoupment] beyond the facts" of *Bull* and *Stone* v. *White*, *supra* (329 U.S. at 301). In so holding, the Court stressed the importance of statutes of limitations and their role as "almost indispensable element[s] of fairness as well as of practical administration of an income tax policy" (*ibid.*), even though in some cases their application might yield what appears to be an inequitable result. See *id.* at 301-303. The Court expressed its concern that an expansion of the doctrine of equitable recoupment beyond the facts of *Bull* and *Stone* "would seriously undermine the statute of limitations in tax matters" (329 U.S. at 302). The Court concluded (*id.* at 303): "If there are to be exceptions to the statute of limitations, it is for Congress rather than for the courts to create and limit them."

Thus, this Court's decisions permit the doctrine of equitable recoupment to be invoked only to raise a time-barred tax claim as an offset or credit against a related tax claim that is currently being litigated in a timely action. Since the court already has juris-

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fund of the earlier-paid taxes having expired. In 1935, the taxpayer received the tax refund that it sought. Since the refunded taxes had been deducted by the taxpayer during the years it paid them, the Commissioner treated the refund as income in 1935. The taxpayer paid the resulting income tax deficiency and thereafter filed a timely suit for refund, contending that, if the refund was to be recognized as income, it should be permitted "to recoup the amount of the barred excise taxes which it had paid between 1919 and 1922." 329 U.S. at 298.

diction over the action on the main claim—*i.e.*, the claim against which the time-barred claim is to be asserted as an offset or credit—invocation of equitable recoupment does not seek to confer jurisdiction upon the court. Hence, it does not violate established principles of sovereign immunity and jurisdiction. The doctrine does not, however, provide a basis for ignoring the statute of limitations and bringing an independent action on a time-barred claim, as respondent did in this case.[10]

2. a. The courts of appeals generally have recognized that the doctrine of equitable recoupment delineated in *Bull* is limited to use in the nature of an offset in a timely-filed action. Taxpayers have not often sought to invoke the doctrine to support jurisdiction over a suit for the affirmative recovery of a

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[10] The commentators have recognized that the need to raise the untimely claim in the nature of an offset in a timely-filed action is a fundamental constraint on the doctrine of equitable recoupment that is reflected in this Court's decisions. See Andrews, *Modern-Day Equitable Recoupment and the "Two Tax Effect:" Avoidance of the Statutes of Limitation in Federal Tax Controversies*, 28 Ariz. L. Rev. 595, 625 (1986) ("Under the doctrine of equitable recoupment, the barred claim is only usable to reduce or wipe out the open claim, but no more. That is to say, it merely operates as a 'diminution of . . . [the] right to recover' [quoting *Stone* v. *White*, 301 U.S. at 539] on the open claim. Otherwise, it would, in effect, permit the party asserting the barred claim full collection or recovery thereon, thereby completely undercutting the statutes of limitation." (footnote omitted)); Willis, *Some Limits of Equitable Recoupment, Tax Mitigation, and Res Judicata: Reflections Prompted by* Chertkof *v.* United States, 38 Tax Law. 625, 633 (1985) ("Recoupment, rather than extending the statute of limitations to correct a perceived injustice, permits a wronged party to recoup the loss against a sum still open to litigation.").

time-barred refund claim, and the courts heretofore have rejected such efforts when they have been made. For example, in *Evans Trust* v. *United States*, 462 F.2d 521 (Ct. Cl. 1972), following a settlement of certain estate tax litigation, the taxpayer filed an independent, time-barred suit seeking an income tax refund on a theory related to the outcome of the estate tax litigation. The Court of Claims emphatically rejected the taxpayer's contention that the court had jurisdiction under the doctrine of equitable recoupment. The court pointed out that the taxpayer's claim was quite different from that presented in *Bull* because it was not "founded on a timely claim for refund" (462 F.2d at 526). The court further explained that the taxpayer's contention could not be accepted because it was "attempting to use recoupment not in its traditional form as a defense to an asserted deficiency, but as an independent ground for reopening years now closed by the statute of limitations" (*ibid.*).

The Court of Claims reaffirmed this fundamental limitation on equitable recoupment in two subsequent cases. In *Brigham* v. *United States*, 470 F.2d 571 (Ct. Cl. 1972), cert. denied, 414 U.S. 831 (1973), the taxpayers brought suit for a refund of tax paid for closed years, arguing that the tax treatment for those years was inconsistent with the government's treatment of similar transactions in later years. The court rejected the argument that the suit could be maintained under the theory of equitable recoupment, stating that the taxpayers "misapprehend the historical function of the recoupment remedy in the tax law" (470 F.2d at 577). The court explained (*ibid.*): "[w]hen its benefits are sought by the taxpayer, the function of the doctrine is to allow the

taxpayer to *reduce* the amount of a deficiency recoverable by the Government by the amount of an otherwise barred overpayment of the taxpayer." Comparing the taxpayers' position to that of the taxpayer in *Bull*, the court emphasized a critical distinction (*ibid.*): "[t]he taxpayers are not seeking to reduce the deficiencies in later years. * * * Rather, the plaintiffs are attempting an extension of the doctrine of equitable recoupment to the case of a refund of taxes for an otherwise barred year." In *Ellard* v. *United States*, 228 Ct. Cl. 815 (1981), the court again reaffirmed these principles where the taxpayer sought to invoke equitable recoupment to provide a basis for jurisdiction over an untimely refund suit that claimed that the taxpayer, in effect, had paid a particular excise tax twice. The court explained (*id.* at 817):

> The plaintiff is not attempting to offset a barred claim against a claim of the Government. Instead, it is using equitable recoupment to revive its own untimely affirmative claim. In *Bull*, *supra*, the Court stated that the "defense" of equitable recoupment "is never barred by the statute of limitations as long as the main action itself is timely." 295 U.S. at 262. Here, the main, indeed, the only action—the plaintiff's refund suit—is untimely.

In *O'Brien* v. *United States*, 766 F.2d 1038, 1048-1051 (1985), the Seventh Circuit similarly emphasized that equitable recoupment cannot provide an independent jurisdictional basis for a time-barred suit. In that case, the IRS had placed a higher value on shares of stock for estate tax purposes than that reported on the return; applying that value to the taxpayer's computation of gain realized from the disposition of those shares would have entitled him to an

income tax refund, but the time for filing such a refund claim had expired.[11] Like respondent here, the taxpayer in *O'Brien* filed an untimely refund claim and brought suit to recover the income tax overpayment. The Seventh Circuit held that the mitigation provisions did not apply and that the doctrine of equitable recoupment did not permit the suit.

The court explained that "it is clear that the doctrine [of equitable recoupment] does not lift the limitations bar to taxpayer's refund suit" (766 F.2d at 1048) because, in contrast to *Bull*, the taxpayer was seeking to invoke the doctrine to maintain an independent, time-barred action, not as a defense in an action that was timely filed. Because it involves a recoupment of one tax payment against another, the court noted, "[t]he doctrine * * * operates only to reduce a taxpayer's timely claim for a refund or to reduce the government's timely claim of deficiency; it does not allow the collection of the barred tax itself" (*id.* at 1049). Hence, the court stated, "the doctrine requires some validly asserted deficiency or refund

[11] The taxpayer had received shares of stock from his father that were later included in the father's gross estate as gifts in contemplation of death (see I.R.C. § 2035). The estate valued the stock at $215 per share for this purpose, and the taxpayer used that same value as his basis in the stock for purposes of computing gain on the subsequent liquidation of the corporation. The IRS asserted an estate tax deficiency, claiming a higher value for the shares. The ensuing Tax Court litigation brought by the estate resulted in the stock's being valued at $280 per share. If the same value were applied to the shares for purposes of computing the gain realized on the liquidation, the taxpayer would have been entitled to a refund of part of the income tax he had paid on the gain. But the taxpayer failed to file a timely income tax refund claim to protect his position pending the outcome of the estate tax dispute.

against which the asserting party desires to recoup a time-barred refund or deficiency * * * and requires the timeliness of the underlying action against which a party seeks to employ recoupment" (*ibid.*) The court then summarized its holding as follows (*ibid.*):

> Attempts by taxpayers to utilize the doctrine to revive an untimely affirmative refund claim, as opposed to offset a timely government claim of deficiency with a barred claim of the taxpayer, have been uniformly rejected. * * * Plaintiff has invoked the doctrine in this precise manner and therefore the district court's holding that equitable recoupment permits the taxpayer's time-barred refund claim must be reversed. O'Brien's untimely refund suit in 1983 asserts recoupment affirmatively to recover an erroneously paid tax and does not seek to offset the amount of a properly asserted and timely deficiency.

Prior to the court of appeals' decision here, the only deviation from this consistent line of precedent was *Kolom* v. *United States*, 791 F.2d 762 (9th Cir. 1986). There, the court permitted the taxpayer to maintain an independent tax refund suit that was concededly untimely,[12] on the theory that equitable recoupment conferred jurisdiction on the court to pre-

[12] *Kolom* involved a dispute over the year for which the taxpayer was liable for the minimum tax. The taxpayer had reported and paid the tax for 1973, but the IRS maintained that it should have been reported for 1972. The taxpayer filed a petition in the Tax Court, which upheld the IRS's determination of a deficiency in minimum tax for 1972. In the meantime, the taxpayer had allowed the time for filing a refund claim for 1973 to expire. Like respondent here, he then filed an untimely administrative claim for a refund of the 1973 tax and thereafter brought suit for a refund in district court.

vent the government from being unjustly enriched. The taxpayer had rested his jurisdictional argument entirely on the mitigation provisions, which the court found to be inapplicable, but the court proceeded to rule on its own motion (see *id.* at 766 n.10) that the taxpayer's refund suit could be maintained under the doctrine of equitable recoupment. The court concluded that the doctrine may be invoked to nullify the statute of limitations whenever the government has been "unjustly enriched" by inconsistent treatment of a single transaction (*id.* at 766-767). The court's failure in *Kolom* to recognize the need for a timely-filed action to provide a basis for jurisdiction appears to rest on a basic misreading of a passage in *Bull*; the court of appeals mistakenly read this Court's explanation of why equitable recoupment can be raised in a timely refund suit commenced by the taxpayer as well as in a timely collection suit commenced by the government (see 295 U.S. at 262-263) as authorizing the invocation of the doctrine in an independent, *untimely* refund suit. See 791 F.2d at 768. The court in *Kolom* did not otherwise explain how its holding can be reconciled with principles of sovereign immunity and statutory limits on jurisdiction, and its decision has been harshly criticized as "simply incorrect." Andrews, *Modern-Day Equitable Recoupment and the "Two Tax Effect:" Avoidance of the Statutes of Limitation in Federal Tax Controversies*, 28 Ariz. L. Rev. 595, 626 n.193 (1986).[13] Thus, *Kolom* provides no reasoned support for the decision below.

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[13] Professor Andrews explained the error in *Kolom* as follows (28 Ariz. L. Rev. at 626 n.193):

> The Ninth Circuit is simply incorrect in this regard because if equitable recoupment is a permissible basis for a refund suit for the barred year rather than the open year, then it completely undercuts the statute of limitation. That this is true is evident from the fact that, in such case, it no longer operates merely to diminish the opposing party's right to recover, but, instead, is serving as an independent ground for obtaining a refund that is directly barred by a statute of limitation.

3. The steps that Congress has taken to address the problem of inconsistent tax treatment of a single transaction further demonstrate that equitable recoupment cannot operate to override the statutory bar to a refund suit that is not based upon a timely filed refund claim. In the wake of *Bull*, Congress acted in 1938 to ameliorate the harsh consequences of the application of the statute of limitations in such cases by adopting the "mitigation provisions" now codified in Sections 1311-1314 of the Code. See Section 820 of the Revenue Act of 1938, ch. 289, 52 Stat. 581. Congress described these provisions as designed "to supplement the equitable principles applied by the courts" (S. Rep. No. 1567, 75th Cong., 3d Sess. 49 (1938)). The mitigation provisions generally provide that, in certain circumstances involving inconsistent tax treatment, a tax year closed by the statute of limitations may be reopened for the correction of an error, thus permitting a taxpayer to claim and sue for a refund (or the government to assess and collect a deficiency) that would otherwise be time-barred. See generally Willis, *Some Limits of Equitable Recoupment, Tax Mitigation, and Res Judicata: Reflections Prompted By* Chertkof *v.* United States, 38 Tax. Law. 625, 633-640 (1985); Maguire, Surrey, and Traynor, *Section 820 of the Revenue Act of 1938*, 48 Yale L. J. 509 & 719 (1939).

The mitigation provisions were adopted after extensive consideration by Congress (see Maguire, Surrey,

and Traynor, *supra*, 48 Yale L.J. at 510), and they are exceedingly complex. One thing that is clear about the provisions, however, is that they do not provide a blanket exemption from the otherwise applicable statute of limitations in all cases in which a double tax liability has been imposed with respect to a single transaction (see especially § 1312). Indeed, it is undisputed (see Br. in Opp. 10, 12) that they have no application to respondent's situation.[14] This detailed statutory scheme is essentially rendered nugatory by the court of appeals' interpretation of equitable recoupment. If equitable recoupment permits a taxpayer to bring an independent, time-barred action to recover taxes assertedly overpaid because of inconsistent treatment by the Commissioner, there was little reason for Congress to have enacted the mitigation provisions; the otherwise time-barred suits authorized by the mitigation statute could be brought anyway under an equitable recoupment theory. Moreover, the mitigation provisions not only would be superfluous, they would be completely overridden by the expansive theory of equitable recoupment adopted by the court of appeals. The restrictions imposed by Congress upon the mitigation remedy would be nullified, and persons Congress refrained from excepting from the normal statute of limitations rules would nevertheless

[14] The mitigation provisions deal exclusively with *income* taxes; they grant relief where there has been a double inclusion or exclusion of an item of income (or a double allowance or disallowance of a deduction or credit) affecting the computation of income tax. See Treas. Reg. § 1.1311(a)-2(b); Willis, *supra*, 38 Tax Law. at 648-652; but see *Chertkof* v. *United States*, 676 F.2d 984 (4th Cir. 1982). Because respondent in this case seeks to recover a payment of *gift* tax, the mitigation provisions clearly are inapplicable.

be able to maintain time-barred refund suits.[15] Thus, the very existence of the mitigation provisions demonstrates that the court below misapplied the doctrine of equitable recoupment.

4. a. The court of appeals below provided no justification for deviating from the established principle that equitable recoupment may be invoked only in the nature of a defense or offset in a timely suit brought to enforce a related claim that is not barred by the statute of limitations. Relying on *Kolom*, the court stated that there are only three preconditions to the application of equitable recoupment in a tax case (Pet. App. 9a-10a): "[t]here must be (1) a single transaction or taxable event, (2) that event must be subjected to two taxes based on inconsistent legal theories, and (3) the amount claimed in recoupment must be barred by limitations while the government's deficiency claim must be timely." This rule would completely obliterate the statute of limitations for certain taxpayers by giving them unlimited time to seek a refund, no matter how stale the claim. The court of appeals' statement of the prerequisites to application of the doctrine of equitable recoupment finds no support in the decisions of this Court. Indeed, it is contrary to both common sense and settled law.

First, as we have explained, the court of appeals' rule takes no account of the fact that the district court

[15] Indeed, the Ninth Circuit in *Kolom* v. *United States*, *supra*, essentially acknowledged that the mitigation provisions are rendered nugatory if equitable recoupment is understood to permit a taxpayer to maintain an independent action that is barred by the statute of limitations. The court there stated (791 F.2d at 766 n.10): "The doctrine of equitable recoupment essentially requires the same criteria necessary to prove application of the mitigation provisions, the mitigation provisions requiring proof of even further criteria."

lacks jurisdiction over an action that does not satisfy the statute of limitations established by Congress. Thus, the court's list of conditions contemplates refund suits for which no statute confers jurisdiction on the district court, and authorizes recoveries for which the United States has not waived sovereign immunity. Second, the court's statement that equitable recoupment is conditioned upon timely assertion of a deficiency by the government is plainly in error. That statement is inconsistent with *Stone* v. *White*, *supra*, where no timely deficiency was asserted, but the government nevertheless was permitted to invoke the doctrine of equitable recoupment to raise its untimely claim for a deficiency as a defense to a timely refund suit, in order to prevent the taxpayer from paying no tax on the income in issue. More generally, it is clear that a requirement that the government's deficiency notice be timely cannot constitute a meaningful constraint on a taxpayer's ability to invoke equitable recoupment. If the government does not assert its deficiency in a timely fashion, the taxpayer could directly defeat the deficiency on that basis; therefore, the government would not be able to impose the tax liability at all, and the taxpayer would suffer no double taxation that could conceivably provide the occasion for a recoupment claim. Thus, there is no basis for suggesting that the decisions of this Court, or any general equitable principles, make the availability of equitable recoupment relief depend upon the timely assertion of a deficiency.

Perhaps the most conspicuous error of the decision below is that it characterizes as "recoupment" an action that cannot accurately be so described. Respondent's suit, approved under the court of appeals' theory, is an independent action that seeks the payment of funds from the United States to respondent. There is

no timely "main action" (*Bull*, 295 U.S. at 262) involving a different tax liability that respondent seeks to adjust with an offset or credit based on her time-barred claim; there is simply nothing against which the time-barred claim can be recouped.

In describing *Bull* as holding that, "when a single transaction is taxed twice under inconsistent legal theories and the government has collected the second tax in a timely action, the earlier tax can be offset against the later one in an action for refund" (Pet. App. 14a), the court of appeals fundamentally misconceives *Bull* and the concept of recoupment. The doctrine of equitable recoupment recognized by this Court has as its underlying principle the notion of recouping one tax payment by means of an adjustment to another tax liability, which is being litigated in a timely proceeding. See *United States* v. *Gulf Oil Corp.*, 485 F.2d 331, 333 (3d Cir. 1973). The court below ignored the crucial fact in *Bull* that the taxpayer's action was not for refund of the overpayment of *estate* tax, which was time-barred. Rather, the estate in *Bull* sought a refund of *income* tax (although its income tax liability was held to have been correctly computed) on the ground that it was entitled to "recoup" against that income tax the amount of the estate tax that had previously been paid on the same transaction. It is for that reason that this Court emphasized the timeliness of the income tax refund suit, stating that recoupment of the time-barred payment would be allowable "so long as the main action itself [was] timely." 295 U.S. at 261-262; see also *Stone* v. *White*, 301 U.S. at 539.

Here, in contrast to *Bull*, respondent does not assert a timely claim for refund of income tax paid, which could be adjusted to reflect another tax payment. Rather, she is trying to recover directly the gift tax

that she contends was paid erroneously. Accordingly, to label respondent's claim as one for equitable recoupment is a misnomer; she is not trying to offset or credit her time-barred gift tax claim against a countervailing open claim in litigation, because there is no other claim (much less an "open" one) involved in this litigation. Respondent's 1976 and 1977 income tax deficiencies have already been the subject of a petition in the Tax Court, which resulted in a settlement of the income tax controversy, and Section 6512(a) of the Code bars respondent from relitigating those deficiencies here. Therefore, contrary to the court of appeals' suggestion (Pet. App. 10a-11a), those income tax deficiencies cannot now be regarded as an open claim against which recoupment may be had. In sum, respondent's cause of action here is nothing more than an untimely claim for refund of gift tax allegedly overpaid. The doctrine of equitable recoupment has no application to this case, and the district court correctly dismissed the complaint as barred by the statute of limitations.

b. To the extent the decision below rests on the idea that general principles of equity require that the statute of limitations be overridden here in order to avoid double taxation (see Br. in Opp. 5), it is misguided. If respondent has an otherwise valid claim for a gift tax refund that is being denied because of the statute of limitations, there is a sense in which she is being treated unjustly. But that kind of injustice or inequity plainly provides no basis for overriding the statute of limitations, else the statute would become a nullity. As this Court has stated, "statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. * * * [T]hat is their very purpose" (*United States* v. *Kubrick*, 444 U.S. 111, 125 (1979)). Thus, limitations periods can "operate harshly and arbitrarily with respect to individuals" whose claims are adversely affected by their enforcement (*United States* v. *Locke*, 471 U.S. 84, 101 (1985)), but they nonetheless must be "strictly observed" (*Soriano* v. *United States*, 352 U.S. at 276).

This strict adherence to statutes of limitations is appropriate because such statutes, as a whole, enhance the fairness of the judicial system by preventing litigation of stale claims; hence, the Court has characterized "the plea of limitations as a 'meritorious defense, in itself serving a public interest'" (*United States* v. *Kubrick*, 444 U.S. at 117, quoting *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 136 (1938)). Indeed, the Court has commented on this incongruity in the context of equitable recoupment itself, noting that "[i]t may easily be overlooked, when the unfairness of the Government's retaining incorrectly collected monies of [the taxpayer] is stressed, that the statute of limitations is primarily an instrument of fairness" (*Rothensies* v. *Electric Storage Battery Co.*, 329 U.S. at 302 n.3). Notwithstanding that potential for unfairness in the individual case, the Court emphasized that courts must resist the "tempt[ation] * * * to seek for ways of relief in individual cases" (*id.* at 302) and instead must apply statutes of limitations as they have been established by Congress.

Respondent is in the same position here as any other taxpayer who has overpaid his taxes, but whose refund claim is barred by the statute of limitations. Her assertion that she has been subjected to "double taxation" (Br. in Opp. 3) does not entitle her to special treatment; a "taxpayer is no more deeply out of pocket" for having paid a tax twice, "once erroneously and once correctly," than for having paid one

erroneous tax. Maguire, Surrey, and Traynor, *supra*, 48 Yale L.J. at 516. If the unfairness of being unable to recover an overpayment of tax is sufficient reason to permit an untimely refund suit, statutes of limitations are meaningless. They would bar only unmeritorious claims—which, of course, can be distinguished from those that are meritorious only by litigating the merits in each case.

Moreover, respondent's claim that she has been subjected to double taxation is highly questionable in any event. The total tax collected by the government (including the gift tax in question here) was less than the amount of the asserted income tax deficiency, *i.e.*, the tax due if the payments in question were income. The district court observed (Pet. App. 20a) that the income tax settlement in the Tax Court appeared to be designed to credit respondent for the gift tax she had paid—an issue that the court of appeals held should be considered on remand after further factual development. Even if we assume that the settlement did not include a credit for the gift tax paid, it is apparent that most of the gift tax cannot be regarded as double taxation. The settlement provided for a sharp reduction in the deficiency asserted for 1976, the year in which the gift tax was paid, which means that most of the payment for that year ultimately was not treated as income.[16] Accordingly, most of

[16] The income tax deficiencies were based on a recalculation grounded in the assumption that the payments to respondent were income. See C.A. App. 48-55. This calculation yielded income tax of $91,471 on the $180,000 payment made in 1976 and $70,639 on the $133,813 payment made in 1977 (on which no gift tax had been paid). The Tax Court settlement (for half of the total deficiency) upheld the 1977 deficiency in full, but held that only $10,416 in income tax was owed for 1976. This was less than 12% of the asserted income tax deficiency for that year, and therefore the settlement did not treat the bulk of the 1976 payment as income.

the 1976 payment should have been subject to gift tax; respondent's effort, in the wake of the Tax Court settlement, to obtain a refund of all of the gift tax paid seeks to insulate most of the 1976 payment from taxation entirely. In sum, there is no singular injustice on the facts of this case, and there is certainly no basis for creating a special exception to the statute of limitations.

The doctrine of sovereign immunity can sometimes leave an injured party without a remedy, but this is not such a case. Respondent had available to her avenues to seek to recover the gift tax that she allegedly overpaid. Even after the time to seek a gift tax refund directly had expired, she still had the opportunity to raise a claim of equitable recoupment. If respondent had paid the 1976 and 1977 income tax deficiencies asserted against her and then brought a timely refund suit in district court or the Claims Court, she could, under *Bull*, have invoked the doctrine of equitable recoupment in that action and sought to diminish the amount of the income tax deficiencies by the amount of the gift tax she had paid. See also Rev. Rul. 71-56, 1971-1 C.B. 404 (IRS will consider equitable recoupment claim administratively).[17] Having failed to pursue these available ave-

[17] It is doubtful that respondent could have raised an equitable recoupment claim in the Tax Court, where she chose to contest the income tax deficiency. In *Commissioner* v. *Gooch Milling & Elevator Co.*, 320 U.S. 418 (1943), this Court held that the Tax Court's predecessor, the Board of Tax Appeals, lacked jurisdiction to consider the taxpayer's equitable recoupment claims. It is generally believed that this restriction applies to the Tax Court today, which is a legislative court with a narrowly prescribed statutory jurisdiction. See *Rothensies*

nues for relief, she should not now be heard to complain that it is unfair to apply the statute of limitations to her untimely refund suit.

This case is controlled by the statutory scheme established by Congress governing suits against the United States to recover tax overpayments. Congress has placed restrictions on its waiver of sovereign immunity for such suits—specifically, it has prohibited the maintenance of a refund suit in court unless a timely refund claim has been filed. In the mitigation provisions, Congress has relaxed these requirements in certain specified circumstances. Respondent's refund suit is untimely under the general rules applicable to such actions, and the suit is not authorized by the mitigation provisions. The courts are not authorized to alter the conditions under which the United States, as sovereign, has waived its immunity from suit, and hence they lack jurisdiction to entertain this suit. As this Court stated in *Rothensies* (329 U.S. at 303), "[i]f there are to be exceptions to the statute of limitations, it is for Congress rather than for the courts to create and limit them."

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v. *Electric Storage Battery Co.*, 329 U.S. at 303; *Elbert* v. *Johnson*, 164 F.2d 421, 423 (2d Cir. 1947); 4 B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 115.2.7, at 115-24 to 115-25 (1981); Willis, *supra*, 38 Tax Law. at 641-642 & n.130; Andrews, *supra*, 28 Ariz. L. Rev. at 613-615; see also I.R.C. § 6214(b). The Tax Court itself has stated that it is subject to the rule of *Gooch Milling*. See *Estate of Schneider* v. *Commissioner*, 93 T.C. No. 47 (Nov. 6, 1989); *Estate of Van Winkle* v. *Commissioner*, 51 T.C. 994, 999-1000 (1969); *Estate of Garber* v. *Commissioner*, 17 T.C.M. (CCH) 646 (1958), aff'd on another issue, 271 F.2d 97 (3d Cir. 1959).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Section 6511 of the Internal Revenue Code (26 U.S.C.) provides in pertinent part:

Limitations on credit or refund

(a) Period of limitation on filing claim

Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

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Section 7422 of the Internal Revenue Code (26 U.S.C.) provides in pertinent part:

Civil actions for refund

(a) No suit prior to filing claim for refund

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

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